NO. 21715

United States
Court of Appeals
for the Ninth Circuit

JOHN C. SWAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the Judgement of the United States District Court for the District of Oregon

BRIEF FOR THE APPELLEE

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STATUTE INVOLVED

18 U.S.C. § 472. *Uttering counterfeit obligations or securities*

Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States,

shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

RULES INVOLVED

Rule 52. *Harmless Error and Plain Error*

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

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COUNTER-STATEMENT OF FACTS[1]

On July 12, 1966, at Salem, Oregon, a car registered to the defendant and containing three (3) men, including the defendant, drove up to the Silver Inn. (TR. 67-68, 80). While two (2) of the men waited in the car, the defendant entered the tavern and ordered a fifteen-cent glass of beer, paying for

[1] "TR" denotes Transcript of Proceedings
"D. Br." denotes Defendant's Brief

same with a ten dollar bill (TR. 67-69). The waitress, Geraldine Hoosier, determined the bill was spurious and offered to return it to the defendant who declined to accept the offer (TR. 70, 73). She queried the defendant as to where he was from and whether he had been downtown drinking. Defendant replied he was from Silverton, was hitchhiking, and that he had been "downtown" drinking at the Powah, Ricksha and Pickaninny Taverns (TR. 70-71, 75), although there is no Pickaninny Tavern in Salem (TR. 70). Defendant was then asked why the other two (2) men in the car didn't come into the tavern to which he apparently made no reply (TR. 70, 74). With respect to the ten dollar bill in question, defendant informed the waitress he could have received it in change while drinking in the foregoing taverns.

Defendant remained in the tavern 30 to 45 minutes. Upon being questioned for the second time as to why the two (2) men in the car would wait so long for him if he was hitchhiking, he abruptly got up and hurriedly departed without finishing the remainder of his third beer (TR. 74, 79).

Shortly before the trial defendant appeared at the Chateau, an establishment where the witness Hoosier was then working. After requesting the witness to cash a personal check, telling her he had previously frequented the establishment with a

friend of his (TR. 76), defendant attempted to engage her in a conversation concerning the forthcoming trial (TR. 76-77). After initially stating he had never been in the Silver Inn "in (his) life," he then admitted being there, although not for a period of forty-five minutes (TR. 77-78).

Two other witnesses also identified the defendant as the individual who passed an allegedly counterfeit bill in the Silver Inn Tavern on the evening of July 12, 1966 (TR. 82-83, 86-87).

The bill passed by the defendant on this date (Govt. Ex. 1) was described as a counterfeit obligation by Secret Service Agent John Wells of the Portland Office based on his training and twenty-four years experience (TR. 96-98). Agent Wells further testified from a summary prepared from certain Agency reports that other bills, identical to the bill passed by the defendant first appeared on June 30, 1966 and that eighteen of these bills had been received by the Secret Service in the State of Oregon: Nine in July, six in August, two in September, and one in October (TR. 98-102). Defendant's objection to the foregoing testimony on the ground he had been unable to examine the original document from which the summary was prepared was overruled (TR. 99-100). No testimony was offered with respect to the manufacturer or distributor of these notes.

Approximately one week later, on the evening of July 18, 1967, Officer W. Dale Halvorson, an off-duty, but uniformed policeman working for the Cabello Tavern in Seattle, Washington, observed the defendant in that establishment (TR. 107-108). Some time around 10:15 P.M. on this same evening a waitress brought Officer Halvorson two ten dollar bills (Govt. Ex. 5) pointing out the defendant as the person from whom she received them (TR. 108-109, 140). Outside the presence of the jury, Officer Halvorson testified these bills were shown to the defendant who admitted passing them stating they were genuine and that he had received them from a bank that morning (TR. 112-113). As a result of defendant's objection to this testimony (TR. 111) as well as an indication from the Court that it might be violative of the *Miranda* precepts, the Government moved to withdraw its offer of proof on this subject (TR. 115-116). The motion was granted.

Secret Service Agent Thomas Moore identified these two bills as counterfeit in nature and identical in composition and source to the bill (Govt. Ex. 1) passed by the defendant at the Silver Inn in Salem, Oregon, on July 12, 1967 (TR. 118-121).

Following defendant's arrest in Seattle, he was informed of the nature of the charges, of his right to counsel, that he need make no statements but

should he do so, they could be used against him in a court of law, and that he could make phone calls should he so desire (TR. 122).

Defendant made no statements or admissions at this time (TR. 122), although during the period of his incarceration following his arrest, he made certain admissions to Agent Moore (TR. 42-49). These admissions were the subject of a successful motion to suppress (TR. 61-62). Following the warning, a search was conducted of defendant's person and at which time a notebook (Govt. Ex. 2) and $80.00 genuine currency was found (TR. 122-123, 130-131). Among the entries in this book was the name "Leroy, Taft, Calif." followed by the number 7633029 (TR. 125). Agent Moore's testimony that he had received reports from other Secret Service Agents containing the name Leroy was stricken on motion of the defendant and the jury instructed to disregard same (TR. 125). Agent Moore then testified he had "discussed counterfeiting matters" with Leroy, who he identified as Leroy Houts, Naylor Avenue, Taft, California. These conversations took place the day of and the day preceding the trial (TR. 127). Thereafter, the notebook (Govt. Ex. 2) was admitted into evidence over defendant's objection with the Court's admonition to the jury that they were the judges of the evidence and could give the exhibit whatever weight they felt it was worth (TR. 126).

Although cross-examination of Agent Moore disclosed Leroy was outside the courtroom during the trial, neither side called him as a witness (TR. 127).

An examination of the roll of currency found on defendant's person showed the bills to be in the following sequence: Three one dollar bills on the outside of the roll, followed by two fives, three ones, two more fives, four ones, a twenty, and three tens on the inside (TR. 131).

Based upon his twenty-five years experience in the Secret Service, Agent Moore concluded the foregoing sequence of the bills indicated they had been received in change from larger denominations, possibly ten dollar bills (TR. 130, 132-134). Agent Moore considered the particular sequence and denomination of the bills to be significant since, in his opinion, it would be unusual for a person to pay for a small purchase with a bill of a larger denomination when he already had bills of smaller denominations (TR. 132). Further, when apprehended passing bills of a particular denomination, a passer would normally have in his possession bills of smaller denominations in the quantity and order in which they were received as change from his various purchases (TR. 132, 134).

On cross-examination, Agent Moore testified the number of counterfeit notes a particular passer

would take with him would depend upon his expertise in this field; the more experienced and practiced operator would carry but one in order to provide an alibi if apprehended (TR. 144-145).

Agent Moore was also queried with respect to mark-up on the type of ten dollar note passed by the defendant in Seattle, to which he replied, "I can tell you what the defendant told me" (TR. 144-145). Defendant interposed no objection to the answer, although his motion to suppress all statements made to Agent Moore had been granted following an extensive hearing (TR. 3-7, 61-62). Agent Moore then testified the defendant told him this type of ten dollar bill cost $65.00 genuine currency for every $100.00 in counterfeit notes (TR. 145).

On redirect, the Government elicited the remainder of his conversation with the defendant on this subject: That defendant knew a person residing in Portland who sold counterfeit money at the foregoing price (TR. 149, 151).

The trial commenced on November 14, 1966, and concluded on November 16, 1966. The jury returned a verdict of guilty, and the defendant was committed to the custody of the Attorney General for a period of two years with the stipulation that he was eligible for parole at the discretion of the Board of Parole.

SUMMARY OF ARGUMENT

I.

Defendant was not prejudiced by the admission of a notebook (Govt. Ex. 2) seized from his person following his arrest in Seattle, Washington, or the testimony of Secret Service Agent Moore concerning an entry contained therein. Similarly, the fact that Agent Moore related a portion of a conversation with a man whose name appeared in this notebook does not require reversal even assuming the conversation was hearsay since the conviction was based upon substantial evidence independent of any alleged hearsay.

II.

The expert testimony of Agent Moore respecting the significance of a roll of currency seized from the defendant following his arrest in Seattle, Washington, was properly admitted. Such testimony, which was within the particular acumen and knowledge of the witness, was highly relevant on the issue of defendant's knowledge and intent.

III.

The admission of testimony by Agent Wells while using a summary prepared from other documents not in evidence was not error requiring reversal. Defendant's failure to assert the question of hear-

say in the trial court constituted a waiver of this point precluding its review.

IV.

No error was committed by the trial court in permitting the redirect examination of Agent Moore on a matter initially broached by defendant on cross. The testimony objected to was well within the confines of the cross-examination. Its admissibility therefore rested within the broad discretion of the trial court which is not subject to review absent an abuse of that discretion.

ARGUMENT

I.

No Error Was Committed In The Admission Of The Notebook Seized From The Defendant Following His Arrest In Seattle, Washington, Or In The Testimony Of Secret Service Agent Moore With Respect To An Entry Contained Therein.

Defendant's first assignment of error presents a multi-pronged attack upon the admissibility of the notebook (Govt. Ex. 2) seized from his person following his arrest in Seattle and Agent Moore's testimony concerning a certain entry contained therein. The assignment is without merit.

Without objection Agent Moore was permitted to testify the notebook contained the entry "Leroy, Taft, Calif." followed by the number 7633029 (Tr.

125). He then testified he had received reports from other Secret Service agents containing the name "Leroy". This answer was stricken and the jury instructed to disregard same (Tr. 125). He further testified over objection that he had talked to Leroy, who he identified as Leroy Houts of Naylor Avenue, Taft, California, telephone number 7633029, about "counterfeiting matters" (Tr. 126). The notebook was then admitted over objection with the court's admonition to the jury that they were " . . . the judges of the weight and sufficiency of the evidence" and could give the exhibit whatever import they felt it merited (Tr. 126).

Agent Moore's initial statement respecting the receipt of reports from other Secret Service agents containing the name Leroy having been stricken, the only question remaining for the Court's consideration is the propriety of his later testimony that he conversed with Leroy about "counterfeiting matters". This statement in no way prejudiced defendant's right to a fair trial, being susceptible to numerous interpretations or inferences. Any number of citizens, innocent and guilty alike, are questioned daily by law enforcement authorities about their knowledge of criminal activities. Thus the mere fact of a conversation between a man whose name appeared in the defendant's notebook and a Secret Service agent concerning counterfeiting matters did

not inure to the defendant's prejudice. Further, the *de minimus* significance of the conversation and the notebook is manifest by the failure of either side to call Leroy as a witness, although he was present outside the courtroom during the trial (Tr. 127), as well as the government's total failure to mention either item during final argument.

Similarly the fact that the conversation may have been hearsay does not require reversal; its admission being harmless error within the ambit of Rule 52 (a), Federal Rules of Criminal Procedure.

"One of the main considerations in deciding if substantial prejudice exists because of the introduction of hearsay material is the strength of the government's case independent of hearsay." *U.S.* v. *Press,* 336 F.2d 1003, 1013 (2nd Cir., 1964), cert. den. 379 U.S. 965. To the same effect: *U.S.* v. *Watkins,* 369 F.2d 170 (7th Cir., 1966). See also *Lutwak* v. *U.S.,* 344 U.S. 604 (1953).

Contrary to defendant's assertion that the case presented "a close factual question" (D. Br. 3), the government's case was clearly and firmly established without the alleged hearsay statement.

Notwithstanding his assertion of mistaken identity (Tr. 157), defendant was positively identified by the waitress at the Silver Inn Tavern and two

(2) other patrons as being the individual who passed a ten-dollar bill (Govt. Ex. 1) at that establishment on July 12, 1966 (Tr. 69-73, 82-83, 86-87). Defendant's statements to the waitress as well as his conduct during his 30-45 minute stay at the tavern are fraught with contradictions and replete with inconsistencies clearly indicating guilty knowledge. Although he told the waitress he was hitchhiking he arrived in his own car; when questioned about the authenticity of the bill he stated he could have gotten it drinking "downtown" at the Powah, Ricksha and Pickaninny taverns although there is no Pickaninny Tavern in Salem (Tr. 70-71, 75, 80); when questioned why the two men in the car continued to wait for him if he was hitchhiking, he abruptly got up and departed, leaving an unfinished beer (Tr. 74, 79). The fact that he later sought out the waitress at her new place of employment shortly before the trial, in which he attempted to engage her in a conversation about the trial, initially telling her he had never been to the Silver Inn Tavern but later admitting he had (Tr. 76-78), further belies his theory of innocence. To further compound matters, just six days later on July 18, 1966, defendant passed two more bills in Seattle, Washington, identical in composition and denomination to the one passed in Salem (Govt. Ex. 5, Tr. 108-109, 118-121, 140).

It is patently apparent from the foregoing that the government's case was not predicated upon the alleged hearsay which defendant urges was "very prejudicial" (D. Br. 15).

In the face of such egregious error it is significant to note defendant failed to move for a mistrial. It is an accepted proposition that denial of an objection to allegedly prejudicial matter does not normally require reversal where defendant fails to move for a mistrial particularly where no curative action is sought of the Court. *Devine* v. *U.S.*, 278 F.2d 552, 556 (9th Cir., 1960); *U.S.* v. *Wright*, 309 F.2d 735, 738 (7th Cir., 1962), cert. den. 372 U.S. 929.

In addition to the foregoing assignment of error defendant also urges the admission of the notebook (Govt. Ex. 2) and the attendant testimony was an application of the principle of "guilt by association" (D. Br. 14). Defendant neglects to point out that at no time during the trial did he see fit to urge this point nor was there a motion for new trial based on this ground. The cases are legion that issues, even if constitutional, not properly raised and preserved in the trial court for review, will not be noticed on appeal. See for example *U.S.* v. *Millpax*, 313 F.2d 152, 157 (7th Cir., 1963), cert. den. 373 U.S. 903; *U.S.* v. *McCarthy*, 297 F.2d 183 (7th Cir., 1961), cert. den. 369 U.S. 850; *U.S.* v *Green-*

berg, 268 F.2d 120, 124 (2nd Cir., 1959); *Minor* v. *U.S.,* 375 F.2d 170, 172 (8th Cir. 1967), and *U.S.* v. *Miller,* 316 F.2d 81 (6th Cir., 1963), cert. den. 375 U.S. 935. Similarly it is axiomatic that an objection on one ground which is untenable does not preserve the point for review even though there may be another and tenable ground which might have been raised but was not. *Taylor* v. *B & O Railroad Co.,* 344 F.2d 281, 287 (2nd Cir., 1965); *U.S.* v. *Miller,* 316 F.2d 81 (6th Cir., 1963), cert. den. 375 U.S. 935. In *Miller,* an appeal from a conviction for unlawful possession and sale of narcotics, defendant urged for the first time on appeal that the use of a "Fargo" device to transmit a conversation which took place in his residence to listeners (government agents) outside was an unconstitutional invasion of his home in contravention of the Fourth Amendment of the Constitution of the United States. The Court *inter alia* declined to consider this question because the constitutional issue was not raised in the District Court notwithstanding appellant's specific objection in that Court to the use of the evidence on grounds other than constitutional. To the same effect see also: *On Lee* v. *U.S.,* 343 U.S. 747, 749-750 N. 3 (1952) and *Gajewski* v. *U.S.,* 321 F.2d 261, 266-267 (8 Cir., 1963).

The only exception to the foregoing principles is where failure to consider the point on appeal would

result in an obvious miscarriage of justice despite defendant's failure to raise the issue in the trial court (R. 52(b), Federal Rules of Criminal Procedure). Not only does the record in the instant case not warrant the invocation of the "plain error" doctrine, but defendant himself makes no such suggestion.

II.

The Trial Court Properly Admitted The Expert Testimony Of Agent Moore Respecting The Significance Of A Roll Of Currency Seized From The Defendant Following His Arrest In Seattle, Washington.

Without case citation of authority, defendant contends that Agent Moore's opinion respecting the significance of the order and denomination of an $80.00 roll of genuine currency seized from his person following his arrest in Seattle, Washington, was error (D. Br. 16, 18; TR. 130-134). This roll consisted of three one-dollar bills on the outside, followed by two five-dollar notes, three ones, two fives, four ones, a twenty and three tens on the inside (TR. 131).

Agent Moore's expertise was predicated upon attendance at certain Treasury Enforcement Schools, field training, and twenty-five years experience in the study, identification and detection of counterfeiters and counterfeit obligations (TR. 129-130, 132,

134-135). In his opinion, based upon the foregoing, the particular sequence and denomination of the various bills comprising the roll indicated they had been received in change from larger denominations, possibly ten-dollar bills. (Tr. 132, 134). He felt it would be unusual for a person to pay for a small purchase with a bill of a larger denomination while in possession of bills of smaller denominations (TR. 132). He further stated that when apprehended, a passer would normally have in his possession bills of smaller denominations in the quantity and order received from his various purchases (TR. 132, 134).

Not only can there be no question concerning Agent Moore's expertise on the above subject, defendant even conceding same at the trial (TR. 144), but it is well settled that the qualifications of the expert witness, as well as the matters to which he may testify, rest peculiarly within the sound discretion of the trial court whose decision will not be disturbed on review absent an abuse of that discretion. *Lelles* v. *U.S.*, 241 F.2d 21 (9th Cir., 1957), *cert. den.* 353 U.S. 974; *Jenkins* v. *U.S.*, 307 F.2d 637, 645 N. 19 (D.C. 1962); *Cohen* v. *Travelers Ins* Co., 134 F.2d 378 (7th Cir., 1943); *Redman* v. *U.S.* 136 F.2d 203 (4th Cir., 1943); *Harris* v. *Afran Transport Co.*, 252 F.2d 536 (3rd Cir., 1958); Wharton's Criminal Evidence, Vol. II, 12th Ed., 1955, p. 507.

In determining if a matter is properly the subject of expert testimony, the test to be applied is whether the subject matter requires any special skill or knowledge not within the realm of the ordinary experience of mankind. See *Riley* v. *U.S.*, 225 F.2d 558, 559 (D.C. 1955); *Fen* v. *Consolidated Freightways,* 120 F.Supp. 289, 292 (*D.C. N.D.* 1954), affirmed 220 F.2d 82 (5th Cir. 1955); *Schille* v. *Acheson Topeka & Santa Fe R.R. Co.,* 222 F.2d 810, 814 (8th Cir., 1955); *U.S.* v. *Alker,* 260 F.2d 135, 155 (3rd Cir. 1958), *cert. den.* 359 U.S. 906. See also 1 *Wigmore on Evidence,* Sec. 682, P. 1092, 3rd Ed. 1940. Similarly, if the expert's testimony is otherwise proper, it is not objectionable as an invasion of the province of jury albeit it relates to the very issue the jury must decide. See *U.S.* v. *Johnson,* 319 U.S. 503, 519 (1943); *Riley* v. *U.S.*, 225 F.2d 558 (D.C. 1955); *Pasadena Research Laboratories* v. *U.S.*, 169 F.2d 375, 385 (9th Cir., 1945), *cert. den.* 335 U.S. 853.

Agent Moore's highly specialized training and experience uniquely qualified him to render an opinion on a matter completely foreign to the layman; the manner in which an individual engaged in counterfeiting activities passes spurious notes and receives change therefrom. Such testimony was highly relevant and probative on the issue of defendant's intent and knowledge particularly in view of his contention that the counterfeit notes passed

in Seattle were innocently received from legitimate sources (D. Br. 6; TR 161-162 and defendant's final argument, TR 184-194).

A somewhat analogous use of expert testimony was found to be proper in *Shew* v. *U.S.*, 155 F.2d 628, 630 (4th Cir., 1946), *cert. den.* 328 U.S. 870, a prosecution for illegal possession of a still. There, a federal officer of fourteen (14) years experience who had searched for and destroyed in excess of 2000 illicit stills was permitted to testify that a still had been in operation at the site where an old furnace and spent mash were found. He was also found to be qualified to describe the component parts of a still as well as the function in the distilling operation of a certain apparatus found on the defendant's premises.

In conclusion, it is submitted that in view of the demonstrated relevancy of Agent Moore's opinion and the broad discretion vested in the trial court to receive evidence of this nature, its reception was not error. See *Wilson* v. *U.S.*, 250 F.2d 312, 325 (9th Cir., 1957), *reh. den.* 254 F.2d 391 (1958).

III.

Admission Of Testimony By Agent Wells Was Not Prejudicial Error Requiring Reversal.

Defendant contends the admission of testimony by Agent John Wells respecting certain documents

not in evidence was hearsay, substantially prejudicing the case and requiring reversal (D. Br. 19-22, TR. 98-100).

Agent Wells, using a summary prepared by him from certain records not in evidence and maintained in Washington, D.C., testified that eighteen (18) bills identical to those passed by the defendant were received by the Secret Service during the months July through October; nine (9) in July, six (6) in August, two (2) in September, and one (1) in October (TR. 98-102).

Defendant's objection to such testimony in the Court below was not predicated upon its alleged hearsay nature but rather that he was unable to examine the records from which the summary was prepared and that the summarization was not admissible unless these records were so voluminous they could not be produced (TR. 99).

Not only did defendant fail to assert the point on which he now relies in the trial court, but he chose to pursue the very subject objected to on direct during cross-examination (TR. 100-102). A more patent case of waiver can hardly be envisioned. See points and authorities on waiver under Government's Argument Point I above.

Even assuming, however, the question of the introduction of hearsay evidence was properly pre-

served in the Court below, the error, if such existed, did not contrive to deprive the defendant of a fair trial.

It is well settled that the admission of hearsay testimony does not per se require reversal. In determining if the defendant was prejudiced as a result thereof, the Courts consider the strength of the Government's case independent of the hearsay. *U.S.* v. *Press,* 336 F.2d 1003, 1013 (2nd Cir., 1963); *cert. den.* 379 U.S. 965; *U.S.* v. *Watkins,* 369 F.2d 170, 172 (7th Cir., 1967); *U.S. v. Cianchetti, et al,* 315 F.2d 584, 590 (2nd Cir., 1963). See also *Delli Paoli* v. *U.S.,* 352 U.S. 232, 236 (1957) and *Lutwak* v. *U.S.,* 344 U.S. 604, 619 (1953).

Defendant's guilt in the case at bar was based upon substantial evidence unaffected either directly or indirectly by Agent Wells' testimony concerning additional counterfeit notes, there being no attempt to connect this evidence with the defendant either during the trial or in final argument. Its admission therefore could not have served to influence the verdict of the jury. The error, if any, was harmless. R. 52(a), F.R.Cr.P.; *Addison* v. *U.S.,* 317 F.2d 808, 816-817 (5th Cir., 1963); and *U.S.* v. *D'Antonio,* 362 F.2d 151, 155 (7th Cir., 1966). In *D'Antonio* the Court noted that

> "Unsubstantial error is not to be viewed in an attitude separated from reality and oblivious to the context of the record and as thus isolated

> relied upon to furnish the basis for reversal. Otherwise, a judgment which could be affirmed would be almost impossible to achieve."

Similarly, in the words of the Supreme Court,

> "We must guard against the magnification on appeal of instances which were of little importance in their setting." *Glasser* v. *U.S.*, 315 U.S. 60, 83 (1942).

IV.

No Error Was Committed By The Trial Court In Permitting Redirect Examination By The Government On A Matter Initially Broached By Defendant On Cross.

Although defendant has not chosen to assign as error the admission of certain of his post arrest statements, his repeated reference to same as violative of the *Miranda* rule and his request that they be considered by the Court in connection with those points specifically raised requires comment (D.Br. 9-10, 22-23).

Initially it must be noted that all post-arrest statements made by the defendant to Agent Moore were the subject of a successful motion to suppress (TR. 61-62). However, on cross examination, defense counsel inquired of Agent Moore as to the markup on the particular type of ten dollar note passed by the defendant (TR. 145). Agent Moore replied, "I can tell you what the defendant told me." Counsel affirmatively pursued the matter by asking "what

did he tell you?", whereupon Agent Moore replied, "It was the sale of $65 on a hundred." No motion to strike was made, nor was any other curative action requested of the Court. On redirect examination, the Government was permitted to elicit the remainder of this conversation as it related to the price (TR. 146-152). Defendant recognized the propriety of this inquiry (TR. 148, 149), his only objection being that the scope of the redirect exceeded that of the cross (TR. 148, 149, 150). On the contrary, the only additional information obtained during this discourse was that defendant knew a man in Portland who offered counterfeit money at the above price and that he would be willing to introduce an agent to this source (TR. 149, 151). The foregoing amply demonstrates the redirect examination of Agent Moore was well within the confines of the cross and was properly admitted under the broad discretion of the trial court whose ruling thereon should not be disturbed on appeal unless an abuse of that discretion is manifest. *Chapman* v. *U.S.*, 346 F.2d 383, 388 (9th Cir., 1965), *cert. den.*, 382 U.S. 909; *Comine v. Scrivener,* 214 F.2d 810, 814 (10th Cir., 1954). For other cases on the permissible scope of redirect examination, see: *U.S.* v. *Allegretti,* 340 F.2d 254, 258 (7th Cir., 1964), *cert. den.* 381 U.S. 911; and *U.S.* v. *Gorman,* 355 F.2d 151, 160 (2nd Cir., 1965), *cert. den.* 384 U.S. 1024.

Under the general rule announced in *U.S. v. Evans* 239 F.Supp. 554 (E.D. Pa., 1965), affirmed 359 F.2d 776 (3rd Cir., 1966), *cert. den.* 385 U.S. 863, it is well settled that

> "Where a witness has been cross-examined as to a part of a conversation, statement, transaction, or occurrence, the whole thereof, to the extent that it relates to the same subject matter and concerns the specific matter opened up, may be elicited on redirect examination."

To the same effect see: *U.S. v. Donovan,* 339 F.2d 404, 410 (7th Cir., 1964), *cert. den.* 380 U.S. 975.

It is significant despite defendant's pious protestations of a violation of the *Miranda* precepts, *Miranda v. Arizona,* 384 U.S. 436 (1965), the point is neither assigned as error (D. Br. 10) nor urged as "plain error" under the terms of Rule 52(b), F.R.Cr.P. Aside from the obvious conclusion that the information elicited from Agent Moore on cross and redirect examination and the manner in which it was obtained inculpate no error, it is apparent defendant waived this point both at the trial and on appeal. (See Points and Authorities under Point I above.) It is respectfully urged therefore that it be rejected in its entirety.

It is also necessary at this juncture to clarify certain misconceptions arising from defendant's statement of facts and attendant specifications of error.

Defendant states that the counterfeit note (Govt. Ex. 1) passed in Salem was never introduced into evidence (D. Br. 6). The record reflects the contrary (TR. 93-94).

Defendant has also chosen to set forth certain portions of a conversation in which he allegedly engaged with Agent Moore following his arrest in Seattle, Washington (D. Br. 7-8). Although the initial recessitation of this conversation states it is the defendant's version (D. Br. 7), later excerpts (D. Br. 8) lead one to the erroneous conclusion that Agent Moore himself was the author of certain promises and inducements. Such is not the case; the various promises relating to parole (D. Br. 7) were the defendant's recollection of the conversation and were expressly denied by Agent Moore (TR. 44, 46).

Defendant's slavish devotion to the incident immediately preceding his arrest at the Caballero Tavern, Seattle, Washington (D. Br. 7-9) can only be characterized as a *non sequitur* since the statement he made at that time to Officer Halvorson was found to be inadmissible (TR. 115-116) and was never brought to the attention of the jury. *A fortiori* it is apparent it should not be considered on review.

CONCLUSION

WHEREFORE, on the basis of the above and foregoing, it is respectfully urged the judgment of conviction of the defendant be affirmed.

Respectfully submitted,

SIDNEY I. LEZAK
United States Attorney
District of Oregon

CHARLES H. TURNER
Assistant United States Attorney

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated this 26th day of September, 1967.

CHARLES H. TURNER
Assistant United States Attorney